

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

REF:OCCL:DH

Contested Cases OA-06-02

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Waive Oral Request for a Contested Case Hearing, and Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing

SUBJECT PETITONS: Docket No. OA-06-02
In the matter of a Contested Case Petition Regarding Conservation District Use Application (CDUA) OA-3266 for HASEKO (Ewa) Inc.'s Request to Construct Papipi Road Drainage Project

BACKGROUND:

On January 11, 2006, the Department of Land and Natural Resources' (DLNR), Office of Conservation and Coastal Lands (OCCL), held a Public Hearing for CDUA OA-3266 for HASEKO (Ewa) Inc.'s request to construct the Papipi Road Drainage project.

On January 20, 2006, the OCCL received a petition from Michael K. Lee asking for a Contested Case (**Exhibit 1**).

AUTHORITY FOR DESIGNATING HEARING OFFICERS:

Hawaii Administrative Rules (HAR), Section 13-1-32 (d) provides that the Board may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR, Section 13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board."

Additionally, Hawaii Revised Statutes (HRS), Sections 92-16 and 171-6 also provide that the Board may delegate to the Chairperson the authority to select the Hearing Officer to conduct a Contested Case Hearing.

BASIS FOR DESIGNATING HEARING OFFICERS:

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

DISCUSSION:

Staff notes HAR, Section 13-1-31 (3) notes, "all persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application." Staff notes the petitioner notes that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.

However, staff notes the petitioners failed to make an oral request for a contested case hearing by the close of the Board meeting at which the matter was scheduled for disposition, as required under HAR, Section 13-1-29 (a). Staff notes the petitioner did file a written petition with the Board within the required time frame of not more than ten days after the close of the Board meeting. Staff notes the Board has the discretion to waive the petitioners' failure to make the oral request. Should the Board agree to waive the petitioners' failure to make the oral request, staff notes that a Hearing Officer should be appointed.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. As indicated above, the determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing should also be conducted by the Hearing Officer rather, than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

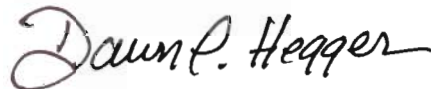
Staff therefore recommends,

RECOMMENDATION:

- 1) That the Board waive the petitioners' failure to make an oral request for a contested case hearing by the close of the Board meeting at which the matter was scheduled for disposition;

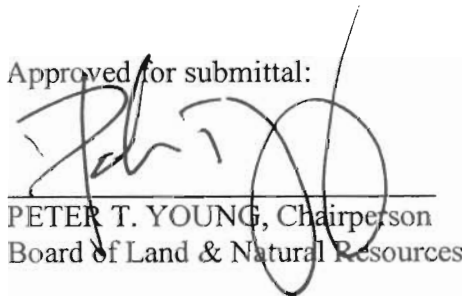
- 2) That the Board authorize the appointment of a Hearing Officer for CC's OA-06-02, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested case Hearing, and
- 3) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



Dawn T. Hegger
Staff Planner

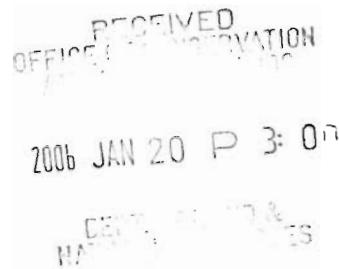
Approved for submittal:



PETER T. YOUNG, Chairperson
Board of Land & Natural Resources

0A-06-2

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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES
OF THE STATE OF HAWAII

In the Matter of)	DLNR File No. CDUA-OA-3266
)	
THE CONSERVATION DISTRICT)	
USE APPLICATION FOR THE)	PETITION FOR CONTESTED
PAPIPI ROAD DRAINAGE.)	CASE HEARING
)	
_____)	

PETITION FOR CONTESTED CASE HEARING

I. INTRODUCTION

Petitioner Michael K. Lee, by and through himself, hereby respectfully requests, pursuant to the Hawaii Administrative Rules Section 13-1-29, that a contested case hearing be held regarding Haseko ('Ewa) Inc.'s Conservation District Use Application for the Papipi Road Drainage Project, D.L.N.R. File No. CDUA-OA-3266 ("the Haseko CDUA"), before the Board of Land and Natural Resources of the State of Hawai'i, ("the Board"), or such hearing officer or master as the Board may designate.

II. DATE OF PUBLIC HEARING

January 11, 2006 at Kalanimoku Building Boardroom.

III. LEGAL AUTHORITY UNDER WHICH HEARING, PROCEEDING OR ACTION IS BEING MADE:

I submit that the requested contested hearing should be held under the provisions of Hawai'i Revised Statutes Chapter 91, the Hawai'i Administrative Rules, Title 13, Subtitle 1.

IV. NATURE OF SPECIFIC LEGAL INTEREST IN THE ABOVE MATTER, INCLUDING TAX MAP KEY AFFECTED:

The property where the proposed drainage channel will be constructed (TMK: (1) 91-1-:002 and 003) and the immediate seaward area of ocean in front of the proposed ocean outlet is intimately known to myself, as a Hawaiian who practices traditions of medicinal healing through the usage of flora and fauna (lā'au lapa'au), and to other founding members of the 'Ewa Beach Limu Project and Hui Mālama o 'Ewa, a group dedicated to the protection of 'Ewa and its unique cultural, historical and natural resources.

My 'ohana and I have traditionally gathered limu and other natural resources, and continue to do so, from the area of the proposed Papipi Road Drainage Outlet, as well as practice traditional and customary practices involving native Hawaiian religion and cultural ceremony. My 'ohana and I also have proprietary rights to certain limu species found fronting the Papipi Road Drainage proposed outlet, of which the University of Hawai'i Pacific Biomedical Research Center is working directly with my 'ohana's interests.

My traditional and customary practices in this area are protected under the Hawai'i State Constitution, Article XII, Section VII as they are exercised by my 'ohana and I for subsistence, religious and cultural purposes, and protected by various other Hawaii Revised Statutes and judicial opinion.

V. THE SPECIFIC DISAGREEMENT, DENIAL OR GRIEVANCE WITH THE ABOVE MATTER:

I take exception that it appears that the DLNR, and other involved agencies, have unlawfully delegated their responsibilities under the Hawaii State Constitution, as

expressed by the Hawai'i Supreme Court in *Ka Pa'akai O Ka 'Āina v. Land Use Commission*, 94 Haw. 31; 7 P.3d 1068, hereinafter *Ka Pa'akai*, as well as the 1998 Memorandum Opinion, No. 19774, by the Hawaii Supreme Court, regarding BLNR's failure to properly identify, assess and protect native Hawaiian traditional and customary practices and historical, cultural and natural resources in the granting of a CDUA for the Haseko Marina Project.

Furthermore, there has been an inadequate identification of valued cultural, natural and historical resources in the affected area, thus constituting a dereliction of constitutionally mandated duties by the State of Hawai'i.

VI. OUTLINE OF SPECIFIC ISSUES TO BE RAISED:

1. The cultural impact study, as required by Act 50, passed in 2000, which amended Chapter 343 was woefully deficient;
2. There are identified natural, cultural and historical resources in the area which will be irreparably harmed if the subject CDUA is granted as is;
3. There are other alternatives to the current proposal, such as redirected discharge to one of seven current outlets, or the establishment of retention basins or other natural filtering methods which would provide less harm, and which haven't been seriously explored by the developer or the State of Hawai'i;
4. There are fish resources such as mo'i and o'i'o, invertebrate resources such as wana, spiritual resources such as ancestral native Hawaiian burial sites, turtles (honu) and monk seals in the affected and impacted area;
5. There are native Hawaiian cultural and religious practices which occur in the affected area which will be adversely impacted.

VII. OUTLINE OF BASIC FACTS:

Haseko ('Ewa), Inc. has agreed to assist Papipi Road Residents with their water drainage issues which occur when heavy storm waters are unable to escape from the

roadway and pond throughout the street and adjacent yards. The chosen solution is to install gutters with a newly created drainage outlet into the nearby ocean. A Final Environmental Assessment was published in the Office of Environmental Quality Control's March 23, 2005 Environmental Notice. Haseko sought and received a SMA from the Honolulu City Council and is now seeking a CDUP from the Board of Land and Natural Resources.

VIII. THE RELIEF OR REMEDY TO WHICH YOU SEEK OR DEEM YOURSELF ENTITLED TO:

To have the Board of Land and Natural Resources deny, or defer the approval of the CDUA-OA-3266 until all reasonable alternatives are seriously considered and the Department of Land and Natural Resources properly identifies native Hawaiian cultural, natural and historical resources in the project area, determines the adverse impact of the proposed Papipi Road Drainage Project on them, and determines how to mitigate these adverse impacts, in accordance with State of Hawai'i statutory law, constitutional law and judicial precedent.

The above named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: January 20, 2006